BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Standardized and Enhanced Disclosure	)	MM Docket No. 00-168
Requirements for Television Broadcast	)	
Licensee Public Interest Obligations	)	

EX PARTE PRESENTATION OF TARGET ENTERPRISES

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EXECUTIVE SUMMARY

On April 8, 2012, *The New York Times* reported that the Commission is preparing to adopt a pilot program for the enhanced broadcast disclosure requirements that, at the outset, will include only the affiliates of ABC, CBS, NBC and Fox in the top 50 markets. The Commission apparently plans to adopt this proposal on April 27th, less than 20 days after floating the details of the program in the newspaper, and without providing notice and seeking comment on the proposal. As the Third Circuit Court of Appeals recently held, merely providing information to the press about the Commission's intentions does not constitute adequate notice under the Administrative Procedure Act ("APA").

Target Enterprises ("Target") urges the Commission to refrain from moving forward at the April 27th meeting with a requirement that broadcasters place the entire political file online in real-time, either adopting the proposals in the *Further Notice* or by launching a pilot program. First, the Commission should not adopt its proposals in the *Further Notice* because the Commission has not adequately considered the: (1) anti-competitive and market-distorting effects of placing details of sensitive political ad rate information online in real-time; (2) irreparable harm to companies such as Target whose trade secrets will be exposed by the Commission's proposal; and (3) compromised privacy rights and the chilling effect on speech that will be caused by placing the details of political ad buying online in real-time.

Second, the Commission should not adopt a related "pilot program" because the Commission has not adequately considered or publicly vetted the: (1) details of its "pilot program," which have been neither transparent nor properly disclosed under notice and comment requirements; and (2) impact and burden of the "pilot program" on small businesses. Moreover, the Commission lacks authority to require that broadcaster political files be placed online, and doing so will subvert the intent of Congress.

In light of Target's position as the only Republican-oriented media placement company to file comments in this proceeding, as well as the company's significant experience with the political file issues raised in the *Further Notice*, Target respectfully urges the Commission to delay action on April 27th relating to any requirements involving political files so that it can give careful consideration to the concerns and proposals discussed herein.

If the Commission nevertheless moves forward, Target urges the Commission to implement a number of safeguards to mitigate any unintended consequences.

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[1] *See* Brian Stelter, *F.C.C. Pushes for Web Site on TV Political Ad Spending*, THE NEW YORK TIMES (April 8, 2012), *available at* http://www.nytimes.com/2012/04/09/business/media/fcc-pushes-for-web-site-on-political-ad-spending-on-tv.html.

[2] *See Prometheus Radio Project v. FCC,* 652 F.3d 431, 450 (3d Cir. 2011); *see also* 5 U.S.C. § 553(b).

[3] Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement for Children's Television Programming Report (FCC Form 398), *Order on Reconsideration and Further Notice of Proposed Rulemaking*, FCC 11-162, MM Dockets Nos. 00-168 and 00-44 (rel. October 27, 2011) ("*Further Notice*").

not adequately considered the: (1) anti-competitive and market-distorting effects of placing details of sensitive political ad rate information online in real-time; (2) irreparable harm to companies such as Target whose trade secrets will be exposed by the Commission's proposal; and (3) compromised privacy rights and the chilling effect on speech that will be caused by placing the details of political ad buying online in real-time.

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In light of Target's position as the only Republican-oriented media placement company to file comments in this proceeding, as well as the company's significant experience with the political file issues raised in the *Further Notice*, Target respectfully urges the Commission to delay action on April 27th relating to any requirements involving political files so that it can give careful consideration to the concerns and proposals discussed herein.

If the Commission nevertheless moves forward, Target urges the Commission to implement a number of safeguards to mitigate any unintended consequences.

I. BACKGROUND ON TARGET ENTERPRISES.

Founded in 1977, Target is a strategic media placement company based in Los Angeles, California that has been involved in hundreds of candidate and ballot initiative races throughout the United States. During the 2010 election cycle alone, the company represented a wide range of clients in 17 campaigns across the country.

Unlike its competitors, Target is engaged in the marketplace on an ongoing basis for both

political and non-political candidates. For over 30 years, the company has been developing a specialized, innovative and proprietary approach to purchasing and placing advertisements for ballot initiative efforts, political campaigns, independent expenditures, and corporate advocacy advertising. The company engages in extensive marketplace research in each designated market area ("DMA"), a major undertaking that costs Target hundreds of thousands of dollars each year, assesses local station policies regarding political advertisements, and has developed a proprietary and sophisticated statistical model of ad-buying behavior and competitive data on programs purchased, as well as demographics. Target has a patent pending on one of its research tools. To Target's knowledge, it is the only major political buying entity that operates this way. If the Commission moves forward and makes the details of political ad spending available online, in real-time, particularly in the middle of an election cycle, the results of Target's trade secrets, business methods, and proprietary approach will be exposed, competitors will be able to exploit Target's hard-won approach, and the value of the company will be lost, causing irreparable harm.

II. THE COMMISSION SHOULD NOT MOVE FORWARD WITH A "PILOT PROGRAM," THE DETAILS OF WHICH ARE NOT PUBLIC AND WHICH WILL NOT BE EFFECTIVE IN YIELDING NEEDED INFORMATION ON THE SMALL BUSINESS IMPACT.

A. The Commission Should Not Adopt A Pilot Program On April 27th After Revealing Scant Details Of The Pilot In The Newspaper Less Than 20 Days Prior.

Target files these comments outside of the normal comment cycle because the Commission made known to *The New York Times* just days ago that it may implement on April 27th a pilot program for the enhanced broadcast disclosure requirements that, at the outset, will include "only the affiliates of ABC, CBS, NBC and Fox in the top 50 markets."[4] Under this reported proposal, the enhanced requirements will apply to all stations after two years. Although multiple broadcasters

[4] *Id.*

have urged the Commission to utilize some form of pilot program to evaluate the impact of requiring that political files be posted online,[5] and to evaluate unintended consequences of the Commission's actions,[6] a program that only includes affiliates of the top four networks in the top 50 markets is a perilous approach for many reasons discussed below.

Of chief concern to Target is that the Commission has not adequately considered the reported design of the pilot program because it has not vetted its proposal in public through notice and comment rulemaking in violation of the APA.[7] Under the APA, an agency may make changes in its proposed rules, but only where such changes are a "logical outgrowth" of the proposal.[8] In order for a final rule to be a "logical outgrowth" of a proposal, however, the agency must have provided proper notice of the proposal.[9] The necessary predicate is that the agency has alerted interested parties to the possibility of the agency adopting a rule different than the one proposed.[10]

Here, the Commission's rulemaking process did not "alert interested parties," such as Target, of the possibility that it may adopt such a pilot program, especially one that could put companies such as Target out of business. As the Third Circuit Court of Appeals recently held, merely providing information to the press about the Commission's intentions does not constitute adequate notice under the APA.[11] In *Prometheus Radio Project v. FCC,* the then-chairman of the Commission wrote an op-ed in *The New York Times* proposing certain rule-changes and simultaneously distributed

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[5] *See, e.g.,* Comments of the National Association of Broadcasters ("NAB") at 29; Named State Broadcaster Associations at 12; Reply Comments of NAB at 4; Comments of NAB on Proposed Information Collection Requirements at 3.

[6] *See* NAB Comments at 21.

[7] 5 U.S.C. § 553(b).

[8] *Sprint Corp. v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003) (internal quotations omitted).

[9] *Id.*

[10] *Id.*.

[11] *See Prometheus Radio Project v. FCC,* 652 F.3d 431, 450 (3d Cir. 2011).

a press release setting a 28-day deadline for the public to comment on the proposed rule-changes. Upon review, the Third Circuit found that publication of the op-ed and distribution of the press release failed to constitute adequate notice under the APA.[12] Accordingly, the current Commission cannot claim to have given adequate notice of its pilot program merely by conveying information about the program to *The New York Times* or other press organizations only days before the Commission's April 27th meeting. Because the Commission has failed to provide adequate notice, implementation of the pilot program does not pass muster under the APA's notice and comment requirements.[13]

Moreover, by failing to provide adequate notice of the terms of the pilot program, seek comment, and consider relevant factors during its rulemaking, the Commission will act in an arbitrary and capricious manner if it adopts the pilot program. It is a longstanding tenet of administrative law that an agency must consider all the "relevant factors" when taking action to avoid a court finding that it has acted in a manner that is "arbitrary and capricious" under Section 706(2)(A) of the APA. For example, in the seminal *Citizens to Preserve Overton Park v. Volpe* case,[14] the Supreme Court held that in addition to examining an agency's statutory authority, a reviewing court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[15] Further, in *Florida Power & Light Co. v. Lorion*, the Court held that an agency action should typically be remanded if the "agency has not considered

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[12] *Id.*

[13] 5 U.S.C. § 553(b).

[14] 401 U.S. 402 (1971).

[15] *Id.* at 416; *see also Cablevision Sys. Corp. v. FCC,* 649 F.3d 695, 714 (D.C. Cir. 2011), citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 102 S. Ct. 2856, 77 L. Ed. 2d 443 (1983); *Tenneco Gas v. FERC,* 969 F.2d 1187, 1214 (D.C. Cir. 1992).

all relevant factors."[16] In light of its failure to provide adequate notice inviting public comment on the pilot program, the Commission clearly has not considered all relevant factors and will be acting arbitrarily and capriciously if it moves forward with the pilot program.

B. A "Pilot Program" That Includes The Top Four Networks In The Top 50 Markets Is Not a "Pilot," Is Not A Balanced Approach, And Will Not Be Effective In Yielding Needed Information On The Impact And Burdens On Small Businesses.

A pilot program that includes the broadcast stations affiliated with the top four networks – ABC, NBC, CBS, and FOX – in the top 50 markets is not a true "pilot." This is a proposal that will impact television stations covering approximately 67% of the households in the United States.[17] Instead of the pilot design the Commission intends, which has not been vetted, the Commission should consider the design elements publicly advanced by commenters in the proceeding. A pilot program should be voluntary[18] and should represent a cross section of media interests and markets so that the consequences and burdens can be adequately and effectively studied for all participants.[19] It is at best arbitrary to select only the stations affiliated with the Big Four networks for the "pilot."

According to an *Ex Parte Notice* filed by Free Press, stations excluded under the Commission's reported pilot program will include, among others, highly-ranked Univision and Telemundo affiliates in Los Angeles, New York, Houston, Phoenix, and Miami that maintain higher audience shares than some of the Big Four affiliates in those markets.[20] The Commission cannot claim to be implementing an effective "pilot program" if it excludes an entire segment of highly-

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[16] 470 U.S. 729, 744 (1985).

[17] *See* Nielsen Local Television Market Universe Estimates (Sept. 24, 2011), available at http://www.tvb.org/market_profiles/131627 (providing local market statistics for the 2011-2012 television season).

[18] *See* NAB comments at 35; NAB Reply Comments at 4.

[19] *See id*; Comments of Named Broadcaster Associations at 13.

[20] Free Press Ex Parte Notice, dated April 12, 2012, at 2, fn. 4.

ranked broadcast stations in top markets simply because the stations are not affiliated with the Big Four networks. Section VI, *infra*, discusses in more detail a number of design elements that many commenters agree should be included in any pilot program implemented by the Commission.

One of the main reasons commenters to the *Further Notice* urge the Commission to conduct a pilot program before full implementation of the enhanced disclosure requirements is to, consistent with the OMB rules, test the political file proposals and develop specific, objectively supported estimates of the burden of the proposed rules on small businesses as required by the Paperwork Reduction Act.[21] Yet, the apparent design of the pilot program the Commission will adopt will not include the small businesses on which the burden and impact will be the most pronounced. This is not an effective design for the pilot program. To allow the Commission to carefully evaluate the impact of the new requirements before imposing them on all broadcast stations, the pilot program should include a wide range of television broadcast interests (large affiliates, small broadcasters, and minority-owned broadcasters) and a range of station market sizes, large and small. The Commission should not move forward with implementation of rules or pilots that have not been vetted publicly.

III. THE COMMISSION SHOULD NOT REQUIRE PLACEMENT OF SENSITIVE POLITICAL AD RATE INFORMATION ONLINE BECAUSE OF THE ANTI-COMPETITIVE AND MARKET-DISTORTING EFFECTS, WHICH WILL CAUSE IRREPARABLE HARM TO BUSINESSES SUCH AS TARGET.

A. Placing Details of Political Ad Spending Online Will Have Anti-Competitive And Market-Distorting Effects.

As explained in comments filed by the National Association of Broadcasters ("NAB") and multiple other parties, a requirement that broadcasters place their complete political files online in

[21] *See* 44 U.S.C. §3501; 5 C.F.R. § 1320.8(a)(requiring federal agencies, prior to submitting an information collection to OMB for approval, to evaluate the need for the information collection, provide a "specific, objectively supported estimate of burden," and consider whether the burden can be reduced); *see also* NAB Comments on Proposed Information Collection Requirements at 3-7; Comments of the Named State Broadcaster Associations at 13.

real-time will make sensitive political ad rate information widely available at the click of a mouse.[22] This real-time disclosure of detailed rate information will have serious anti-competitive and market-distorting effects and will cause small businesses such as Target to be irreparably harmed.

Today's media-buying market functions competitively because media buyers and stations do not have immediate access to their competitors' work product – *i.e.*, the rates they secure for their clients. Similar to an auction, media buyers do not know how much their competitors will bid for ad time on any given day, at any given time. Under the Commission's proposed online political file requirement, however, this will no longer be the case. If broadcasters are required to place their complete political files online each day in real-time, all of the detailed ad rate info will be readily available to all competitors. As a consequence, the market will lose its incentive for competition. Not only will the disclosure of this proprietary information neutralize any advantages between competing media buyers, but broadcast stations will also be provided a "convenient and completely legal way to act 'with conscious parallelism' to put a floor under rates during election seasons."[23] As stated in comments filed by CBS Corporation, ABC Television Stations, Fox Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc. ("Network Station Owners"), the Commission's proposal seems "at odds with the commonsense view that the sharing of price information among rival sellers is unhealthy for competition."[24] Indeed, rather than functioning as a competitive auction, the market will be as uncompetitive as an auction in which all of the bidders know how much the others will bid.

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[22] *See* Reply Comments of CBS Corporation, ABC Television Stations, FOX Television Stations, Inc., NBC Owned Television Stations and Telemundo Stations, and Univision Television Group, Inc. ("Network Station Owners") at 12; *see also* NAB Comments at 21; NAB Reply Comments at 21.

[23] Reply Comments of Network Station Owners at 14.

[24] *Id.*

The anti-competitive and market-distorting impact of the Commission's proposed rules will irreparably harm Target and other small business media buyers because the rules will devalue the intellectual property trade secrets, business methods, and work product that these companies offer their clients and deprive them of the opportunity to operate in the currently existing competitive marketplace. The Commission has failed to properly study this detrimental impact and irreparable harm on businesses such as Target and, therefore, should not move forward with the proposed rules or its "pilot program" on April 27th.

B. If The Commission Adopts Either Its Enhanced Disclosure Requirements in the *Further Notice* Or Its Pilot Project, Target's Trade Secrets Will Be Disclosed, Destroying Its Property Interest and Resulting In A Taking Under The Fifth Amendment.

Target has developed a proprietary business model, which involves the expenditure of substantial amounts of time and money annually and utilization of highly skilled professionals. These professionals prepare analyses and studies, and build a proprietary computer statistical model and database that enables Target and its clients to achieve the most effective media purchases during an election cycle. Target has a patent pending on a research tool it has developed. Target's business model and the tools it has developed constitute the company's unique, protected trade secrets; to Target's knowledge, it is the only major political buying entity that operates this way.

Target's business model is expressly designed to operate through the conclusion of the 2012 election cycle. Indeed, Target invested in and developed its business model based on the Commission's existing rules and the reasonable expectation that the government would not disclose its trade secrets in this fashion now contemplated by the Commission. The Commission, through its proposed rules, will affirmatively interfere with these reasonable investment-backed expectations.

If the Commission proceeds to make the details of political ad spending available online in real-time, particularly in the middle of the 2012 election cycle, the Commission will have taken steps to affirmatively disclose to the public and its competitors Target's protected business model and

proprietary approach. The Commission's proposals consequently threaten Target with a taking by the federal government under the Fifth Amendment takings clause.[25] This unconstitutional action will cause the value of the company to be lost.

C. The Commission Has Not Studied The Impact On Small Businesses, The Burden Under the Paperwork Reduction Act, And The Duplication Of Paperwork That Already Is Disclosed To the Federal Election Commission.

Target shares the concerns expressed by other commenters that the Commission has not adequately studied the impact of its proposed online political file requirement on small businesses as required by the Regulatory Flexibility Act ("RFA").[26] Under the RFA, the Commission must both analyze the economic impacts on small entities and consider significant alternatives to minimize the impact.[27] As noted by the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters, "the Commission has not fully acknowledged, much less actually considered and developed any data to evaluate, the economic impacts of its proposals."[28] This is particularly troubling in light of the serious consequences the proposed rules will have on small businesses, such as small business media buyers, small political entities and campaigns, and broadcast stations, alike. As the Named State Broadcaster Associations commented in their joint filing, "the Commission is not even sure how many 'small business' television stations will be affected by this new [online political file] requirement."[29] While the Commission has failed to properly study the effects of its proposal on small business television

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[25] *See Ruckelhaus v. Monsanto*, 467 U.S. 986 (1984) (recognizing intellectual property rights as protected property rights under the Fifth Amendment takings clause); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[26] *See* 5 U.S.C. § 603; *see also* Joint Comments of the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters at 20; Comments of the Named State Associations at 13.

[27] *See id.*

[28] *See* Joint Comments of the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters at 20.

[29] Comments of Named State Broadcaster Associations at 13.

stations, the record is also devoid of evidence that the Commission has considered the detrimental impact on small business media buyers and other political campaigns and organizations discussed herein. Because the Commission has failed to conduct an adequate analysis as required by the RFA, it is premature to adopt any new rules as proposed.

Similarly, the Commission has failed to meet its obligations under the Paperwork Reduction Act ("PRA").[30] The PRA requires the Commission, prior to modifying its public inspection file rules, to ensure that it minimizes the burdens imposed by the new requirements and that such burdens are necessary and useful.[31] Accordingly, the PRA makes all information collections, such as the Commission's proposed online public file requirements, subject to approval by the Office of Management and Budget ("OMB").[32] Prior to submitting a proposed information collection to the OMB for approval, the Commission is required to carefully assess all proposed information collections by evaluating the need for the information collection, providing a "specific, objectively supported estimate of burden" imposed by the new rules, and evaluating whether the burden can be reduced.[33] Additionally, federal agencies are urged to test any information collection through a pilot program if appropriate.[34] The record, so far, shows no evidence that the Commission has sufficiently met these obligations.

As discussed above, the Commission's proposed online disclosure rules will place an extreme burden on Target and other small business media buyers by (1) adding additional time and expense when transacting with a broadcast station; (2) devaluing the intellectual property trade

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[30] *See* 44 U.S.C. § 3501.

[31] *Id.*

[32] 5 C.F.R. § 1320.8.

[33] *Id.*. § 1320.8(a)(1), (4), and (5).

[34] *Id.* § 1320.8(a)(6).

secrets, business methods, and work product that these companies offer their clients; and (3) depriving them of the opportunity to operate in the currently existing competitive marketplace. Moreover, the proposed rules will impose a heavy administrative burden on Target and other small business media buyers. To meet its obligations to its clients, Target will be forced to hire additional employees and devote significant amounts of time to monitor on a daily basis the immense amounts of data that broadcast stations across the country will be required to post online. As detailed in Section VI below, however, this burden can easily be reduced. Even if the Commission elects to move forward with new online disclosure rules, the burden on media buyers such as Target can be minimized by requiring that aggregate ad rate information be posted online rather than data revealing the individual prices paid for specific ad spots on a daily basis.[35] The Commission should carefully consider the burden of its proposed rules and the readily available alternatives before imposing new rules that will cause serious harm to media buyers, political campaigns, and other organizations.

Despite multiple comments in the record urging the Commission to appropriately utilize a pilot program,[36] the Commission has not yet done so, and the Commission's reported pilot project design will apply only to major networks in major markets where the impact on small businesses cannot be adequately studied. As discussed in more detail in Section VI, the Commission should conduct any pilot program transparently and with a sufficiently diverse range of broadcast television interests and media markets to ensure that the burden of the Commission's proposed rules is effectively evaluated.

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[35] *See e.g.,* Ex Parte Letter filed by Barrington Broadcasters, et al., dated February 15, 2012.

[36] *See, e.g.,* Comments of NAB at 29; Named State Broadcaster Associations at 12; Reply Comments of NAB at 4; Comments of NAB on Proposed Information Collection Requirements at 3.

Further, as noted by NAB in its Supplemental Comments, in order to obtain OMB approval for an information collection under the PRA, the Commission must certify that the collection "is necessary for the proper performance of the functions of the agency, including that the information has practical utility" and "is not unnecessarily duplicative of information otherwise reasonably accessible to the agency."[37] As NAB observed, "the data available on campaign spending at the [Federal Election Commission] is extensive and includes detailed information about broadcasting."[38] This information on the Federal Election Commission's ("FEC") website, as explained in greater detail in NAB's *Ex Parte Notice*, overlaps to a significant degree with the information the Commission is now attempting to require broadcasters to post to the Commission's website.[39] In light of the political records already available to the Commission on the FEC's website, the Commission's proposed requirement that broadcast stations post their political files online fails to meet the OMB's standards.[40]

IV. THE COMMISSION WILL SUBVERT THE INTENT OF CONGRESS IF IT EXTENDS AN ONLINE REQUIREMENT TO BROADCASTERS' POLITICAL FILES; ABSENT LEGISLATIVE ACTION, THE COMMISSION LACKS AUTHORITY TO REQUIRE ONLINE PLACEMENT OF POLITICAL FILES.

Not only has the Commission failed to conduct the proper regulatory analyses that are required by statute before implementing new information collecting rules, but the Commission is also attempting to implement rules that are contrary to the clear intent of Congress. Target agrees with the statutory analysis in NAB's Supplemental Comments finding that Congress did not intend for broadcasters to be subject to an obligation to place their political files online.[41] In the Bipartisan

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[37] *See* Supplemental Comments of NAB at 5 (citing 44 U.S.C. 3506(c)(3)(A), (B)).

[38] *Id.* at 4.

[39] *See* NAB Ex Parte Notice, dated April 5, 2012.

[40] *See id.*

[41] NAB Supplemental Comments at 2.

Campaign Reform Act of 2002 ("BCRA"),[42] Congress expressly contemplated that certain election-related records be made available online but intentionally did not extend this requirement to broadcasters' political files.

As explained by NAB, Congress expressly required the FEC to make certain records available for physical inspection in the offices of the FEC ***and*** on the Internet.[43] In doing so, Congress established two distinct obligations for the FEC: (1) making a record available for public inspection at a physical location; and (2) making a record available on the Internet. In contrast, Congress made no such requirement when establishing the obligation of broadcasters to collect and make political records available to the public under the BCRA. Instead, Congress referred only to making such records available to inspection.[44] This distinction is significant, for "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[45] Accordingly, NAB is correct in its conclusion that the Commission must presume Congress acted intentionally in not imposing online disclosure requirements on broadcasters.

Target also agrees with NAB's argument that in light of the distinctions expressly drawn by Congress in the BCRA, the Commission lacks the authority, absent further legislative action, to require broadcasters to post their political files online.[46] While proponents of the Commission's proposed rules may argue that Congress did not explicitly bar the Commission from imposing such a requirement, this argument fails under examination of legal precedent. As NAB points out,

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[42] P.L. 107-155, 116 Stat. 81 (2002).

[43] *See* NAB Supplemental Comments at 2 (citing BCRA § 501, amending § 304(a)(11)(B) of FECA (2 U.S.C. § 434(a)(11)(B)).

[44] *See id.* at 3 (citing BCRA § 504, amending section 315 of the Communications Act of 1934).

[45] *Id.* at 4 (citing *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991)(additional citations omitted)).

[46] NAB Supplemental Comments at 6.

statutes are "not written in 'thou shalt not' terms," and if courts were to presume a delegation of power absent an express withholding of such power, the Commission and other agencies would enjoy virtually limitless authority.[47] In light of this precedent and the text of the BCRA, the Commission has no basis on which to claim statutory authority to impose a requirement that broadcasters post their political files online.

V. REQUIRING PLACEMENT OF POLITICAL AD SPENDING INFORMATION ONLINE, IN REAL-TIME WILL HAVE A CHILLING EFFECT ON POLITICAL SPEECH.

In addition to considering the regulatory burden of requiring online political files, the Commission should also consider the significant impact such a requirement would have on speech. Under the Commission's new rules, broadcasters will be required to post to the Internet in real-time their complete political files, which contain detailed unit costs and personal identifying information for all advocates who have purchased political ad time. Although this information is currently available in stations' physical files, there is a vast difference between making individuals' personal information available in paper files housed at a limited number of locations and making personal information widely available to anyone in the world with an Internet connection. This is especially true when individuals are engaging in advocacy with respect to controversial political topics. As already discussed, Congress recognized this important distinction when it chose not to require online disclosure of broadcasters' political files under the BCRA.[48]

As explained by the National Religious Broadcasters, "there is a 'qualitative difference' between listing information on the identities of persons supporting a particular candidate or the names of members of a local advocacy group in a *physical* file open for public inspection . . . and

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[47] *Id.* at 7 (citing *Railway Labor Executives' Association v. National Mediation Board,* 29 F. 3d 655, 671 (D.C. Cir. 1994)).

[48] *See* NAB Supplemental Comments at 3 (citing BCRA § 504, amending section 315 of the Communications Act of 1934).

having that information spread over the Internet."[49] Faced with the prospect of having their personal identifying information widely available on the Internet and an increased likelihood of harassment, individual advocates will likely participate less, not more, in the political process as a result of the Commission's proposed rules. This type of online disclosure raises serious privacy concerns and places an unreasonable burden on individuals' First Amendment right to participate in political speech.

Campaigns spend roughly 70-80% of their financial resources on political advertising. Political ads are their "speech" and how candidates principally communicate with voters. How, when, and with whom candidates place their ads to speak to the public – *i.e.,* their speech strategy – will be widely available online in real-time if the Commission moves forward with its proposed rules. Moreover, the proposed rules may require that this information be made available at the time the ad is purchased prior to it even running. Giving opponents a heads-up prior to any ad would be a significant infringement on campaigns' First Amendment right to political speech and would deter participation. As noted by the National Religious Broadcasters, the "chilling effect" that the Commission's proposed rules would impose on political campaigns is clear.[50]

While *Target* appreciates the need to make certain political advertising information publicly available, the detrimental effects on speech will far outweigh any benefit of requiring broadcasters to post their complete political files online. The Commission should carefully weigh these implications rather than simply presuming that posting more information to the Internet will inherently foster more public participation in the political process.

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[49] Comments of National Religious Broadcasters at 8-9 (emphasis in original).

[50] *Id.* at 11.

VI. TARGET OPPOSES THE REQUIREMENT TO PLACE DETAILED POLITICAL AD SPENDING ONLINE IN REAL-TIME; HOWEVER, TO THE EXTENT THE COMMISSION MOVES FORWARD, THE REQUIREMENTS SHOULD BE MODIFIED, AND CERTAIN SAFEGUARDS SHOULD BE IMPLEMENTED.

For all the foregoing reasons, Target opposes the Commission's proposed requirement that broadcasters place their political files online in real-time. However, to the extent the Commission elects to move forward with implementation of either its proposed rules in the *Further Notice*, or its "pilot project," certain safeguards should be put in place.

First, Target joins the NAB and other commenters who have called for the Commission to utilize an appropriate pilot program to evaluate the effects of requiring online disclosure of broadcasters' political files.[51] To be clear, however, such a pilot program must be a true pilot program, unlike the plan the Commission is reportedly preparing to adopt at its upcoming April 27th open meeting. Any pilot program should include a representative range of diverse and minority television broadcast interests, from small and large markets, not merely the stations affiliated with the top four broadcast networks in the top 50 markets. As Free Press points out, minority stations should not be excluded from the Commission's plans.[52] If a pilot program is implemented, it should be used by the Commission to carefully analyze the proposed rules' regulatory burden and impact on small businesses.

Second, Target agrees with other commenters that any implementation of new political file disclosure rules should be phased in gradually over a number of years in order to allow the Commission to adequately study the effects of the pilot program and address problems that may

[51] *See, e.g.,* Comments of NAB at 29; Named State Associations at 12; Reply Comments of NAB at 4; NAB Comments on Proposed Information Collection Requirements at 3.

[52] *See* Free Press Ex Parte Notice, dated April 12, 2012.

arise.[53] To this end, the Commission should not implement changes in political disclosure rules in the middle of an election cycle. Instead, the Commission should implement any new enhanced disclosure requirements after the current election cycle is closed and well in advance of the next election cycle in 2014 so that all interested parties can prepare for online disclosures.

Third, if the Commission elects to move forward with new online disclosure requirements, Target agrees with numerous commenters that online disclosure of political ad information should be made in the aggregate, rather than disclosing specific data revealing what rates have been paid for specific periods of time.[54] The problem with the Commission's proposal that broadcasters should post political ad sale information online "immediately" is that all broadcasters may not have the same urgency about when they post the information online.[55] In a political season, if one campaign's ad purchases are uploaded and another's are not, the latter campaign could gain an advantage. A uniform approach to posting information online is needed in order to ensure that the online information does not distort the market and lead to unintended consequences. In order to have a uniform approach, the Commission should adopt the proposal advanced by Barrington Broadcasting, et al, that the political file be updated weekly with the aggregate amount of money paid for spots during the week.[56] Barrington was not alone in its suggestion that aggregate political spending should be posted online on a weekly basis, or some other interval that is longer than a

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[53] *See* LUC Media Group, Inc.'s Ex Parte Notice, dated March 1, 2012 (proposing that full implementation of an online public file not begin until 2014 and that stations in the top 20 markets not be required to place public files online until 2013); *see also* Reply Comments of the Joint Television Parties at 15; NAB Comments at 31.

[54] *See* Ex Parte Letter filed by Barrington Broadcasters, et al., dated February 15, 2012; Reply Comments of Network Station Owners at 15; *see also* NAB Ex Parte Notice, dated April 12, 2012.

[55] *See* 47 C.F.R. § 73.1943(c).

[56] *See* Ex Parte Letter filed by Barrington Broadcasters, et al., dated February 15, 2012.

single day.[57] A complete review of the record in this proceeding reveals that nearly all commenters, except for two (LUC Media Group, Inc. and the Public Interest Public Airwaves Coalition), either favored or expressed no objections to posting online aggregate information about political ad spending. By making political ad rate information available in the aggregate, the Commission can achieve its goal of increasing transparency and public access to this information while avoiding the anti-competitive and market-distorting effects of making sensitive, proprietary rate information widely available on the Internet. Further, to the extent that individuals would like to access this additional, more detailed information, it would still be available at the local stations.

Fourth, Target shares the view of a number of commenters that if and when political files must be posted online, such posts should be made prospectively only, and should not include the last two years of data that is contained in the local file.[58] Thus, if the Commission takes Target's suggestion that these requirements should not pertain until the next election cycle, then broadcasters and interested parties can begin to prepare for how the information will be disclosed online on a prospective basis for the next election season, beginning in 2014. This safeguard is important to mitigate any anti-competitive impacts of the Commission's proposal to place the entire political file online.

VII. CONCLUSION.

As the Third Circuit Court of Appeals made clear, merely providing information to the press about the Commission's intentions does not constitute adequate notice under the APA. For this reason, the Commission cannot move forward at the April 27th meeting with its "pilot program," the

[57] *See* Reply Comments of Network Station Owners at 9; Reply Comments of the Joint Television Parties at 9; NAB Comments at 14; Comments of the North Carolina Association of Broadcasters, the Ohio Association of Broadcasters, and the Virginia Association of Broadcasters at 7.

[58] *See* Comments of the Joint Broadcasters at 25; Reply Comments of the Joint Television Parties at 21; Comments of Broadcast Licenses, L.P., Eagle Creek Broadcasting of Laredo, LLC, Journal Broadcast Corporation, JW Broadcasting, LLC, Mountain Licenses, L.P., Sarkes Tarzian, Inc., Spanish Broadcasting System, Inc., and Stainless Broadcasting, L.P. at 14.

impacts of which have not been publicly vetted. In addition, in the middle of an election cycle, the Commission should not adopt its proposals in the *Further Notice* because the Commission has not adequately considered the: (1) anti-competitive and market-distorting effects of placing details of sensitive political ad rate information online in real-time; (2) irreparable harm to companies such as Target whose trade secrets will be exposed by the Commission's proposal; and (3) compromised privacy rights and the chilling effect on speech that will be caused by placing the details of political ad buying online in real-time.

Respectfully Submitted,

/s/

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